

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

PROMOTE INNOVATION LLC,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 2:10-cv-242 (TJW)
	§	
PFIZER INC. and PHARMACIA & UPJOHN	§	
COMPANY, INC.,	§	
Defendants.	§	

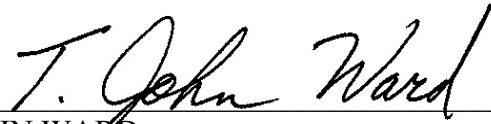
ORDER

Before the Court is Defendants’ motion to dismiss Plaintiff Promote Innovation LLC’s (“Promote”) complaint under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 14.) Promote’s complaint alleges a cause of action for false patent marking under 35 U.S.C. § 292. The Federal Circuit in *In re BP Lubricants USA, Inc.*, --- F.3d ----, 2011 WL 873147, at *1 (Fed. Cir. Mar. 15, 2011) held that “Rule 9(b)’s particularity requirement applies to false marking cases and . . . a complaint alleging false marking is insufficient when it only asserts conclusory allegations that a defendant is a ‘sophisticated company’ and ‘knew or should have known’ that a patent expired.” The Court finds that Promote’s complaint asserts the same type of conclusory allegations that the Federal Circuit in *BP Lubricants* found insufficient under Rule 9(b). Therefore, the Court GRANTS Defendants’ motion to dismiss Promote’s complaint under Rule 12(b)(6).

The Federal Circuit, however, also admonished the district courts to grant leave to amend the pleadings given the uncertainty in the law, previous to *BP Lubricants*, regarding whether Rule 8 or Rule 9(b) pleading standards applied to complaints for false marking. *Id.* at *5. Hence, the Court ORDERS that Promote’s complaint is DISMISSED WITHOUT PREJUDICE with LEAVE TO AMEND within thirty (30) days from the date of this Order.

It is so ORDERED.

SIGNED this 4th day of April, 2011.

A handwritten signature in black ink, reading "T. John Ward". The signature is written in a cursive style with a large, stylized "T" and "W".

T. JOHN WARD

UNITED STATES DISTRICT JUDGE